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APPELLATE COURTS

JUL 25 1989

FILED

July 24, 1989

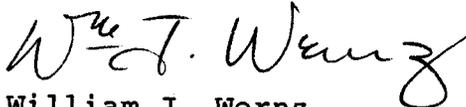
Office of Appellate Courts
230 State Capitol
St. Paul, MN 55155

Re: Petition for Amendment to Rules of Professional Conduct

Dear Clerk:

Enclosed is the original and seven copies of a petition and related statement for filing. We understand that the Minnesota State Bar Association will also be filing proposals for other amendments to these rules shortly.

Very truly yours,



William J. Wernz
Director

WJW:tt

Enclosures

cc: Hon. Glenn E. Kelley
Mary Jo Ruff

C8-84-1650

FILE NO.
STATE OF MINNESOTA
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

JUL 25 1989

FILED

PETITION OF THE
LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

In Re Petition to Amend the
Minnesota Rules of Professional
Conduct.

WHEREAS, The Minnesota Rules of Professional Conduct were adopted by the Minnesota Supreme Court to replace the Minnesota Code of Professional Responsibility on September 1, 1985, and

WHEREAS, a Lawyers Board Rules Committee (Rules Committee) was appointed in 1987 by the Lawyers Professional Responsibility Board (Board) to study and consider the Rules of Professional Conduct, and

WHEREAS, the Rules Committee has studied the Rules of Professional Conduct and proposed certain rule amendments to the Board, and

WHEREAS, on April 15, 1988, and September 9, 1988, the Board approved certain amendments to the Minnesota Rules of Professional Conduct, and

WHEREAS, the Board believes that the amendments would provide greater clarification and notice to members of the Minnesota bar concerning the ethical standards, and

WHEREAS, the Board also believes that the proposed amendment to Rule 1.6 would further the public's confidence in the legal system.

NOW, THEREFORE, the Lawyers Professional Responsibility Board respectfully petitions the Minnesota Supreme Court to hold public hearings concerning proposed amendments to the Minnesota

Rules of Professional Conduct as attached to this petition. A statement in support of the proposed rule amendments is also filed herewith.

Dated: July 20, 1989.

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

By Gregory M. Bistram
GREGORY M. BISTRAM
VICE-CHAIRMAN

PROPOSED AMENDMENTS

INDEX

1. Rule 1.6(b) and Comment - Confidentiality Amendment.
2. Rule 7.2(d) and (e) - Advertising Rule Amendment.
3. Rule 8.4(g) - Failure to File Tax Return Amendment.

Rule 1.6. Confidentiality of Information

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of a client;
- (2) use a confidence or secret of a client to the disadvantage of the client;
- (3) use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

(b) A lawyer may reveal:

- (1) confidences or secrets with the consent of the client or clients affected, but only after consultation with them;
- (2) confidences or secrets when permitted under the Rules of Professional Conduct or required by law or court order;
- (3) the intention of a client to commit a crime and the information necessary to prevent a crime;
- (4) confidences and secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the futherance of which the lawyer's services were used;
- (45) confidences or secrets necessary to establish or collect a fee or to defend the lawyer or employees or associates against an accusation of wrongful conduct.

(c) A lawyer shall exercise reasonable care to prevent employees, associates and others whose services the lawyer utilizes from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (b) through an employee.

(d) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Comment--1985

General

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the

legal system require the lawyer to preserve confidences and secrets of one who has employed or sought to employ the lawyer. A client must feel free to discuss whatever the client wishes with the lawyer and a lawyer must be equally free to obtain information beyond what the client volunteers. A lawyer should be fully informed of all the facts of the matter the lawyer is handling in order for the client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of independent professional judgment to separate the relevant and important from the irrelevant and unimportant.

Observance of the lawyer's ethical obligation to hold inviolate the client's confidences and secrets not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Authorized Disclosure

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client consents after consultation, when necessary to perform professional employment, when permitted by the Rules of Professional Conduct or when required by law.

The confidentiality required under this rule should not allow a client to utilize the lawyer's services in committing a criminal or fraudulent act. A lawyer is permitted to reveal the intention of a client to commit a crime and the information necessary to prevent the crime. In addition, where the lawyer finds out, after the fact, that the lawyer's services were used by the client to commit a criminal or fraudulent act, the lawyer has discretion to reveal information necessary to rectify the consequences of the client's crime or fraud. A lawyer is not permitted, however, to disclose a client's criminal or fraudulent act committed prior to the client's retention of the lawyer's services.

Unless the client otherwise directs, a lawyer may disclose the client's affairs to partners or associates.

It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so

that the sanctity of all confidences and secrets of clients may be preserved.

If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information.

A lawyer must always be sensitive to the client's rights and wishes and act scrupulously in making decisions which may involve disclosure of information obtained in the professional relationship. Thus, in the absence of the client's consent after consultation, a lawyer should not associate another lawyer in handling a matter; nor, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the client's identity or confidences or secrets would be revealed to that lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

Unless the client otherwise directs, it is not improper for a lawyer to give limited information from the lawyer's files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in selecting the agency and warns the agency that the information must be kept confidential.

Protecting Confidences

The attorney-client privilege is more limited than the lawyer's ethical obligation to guard the client's confidences and secrets. The ethical obligation, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

Using Confidences or Secrets

A lawyer should not use information acquired in the course of the representation of a client to the client's disadvantage and a lawyer should not use, except with the client's consent after full disclosure, such information for the lawyer's own purposes.

Likewise, a lawyer should be diligent in efforts to prevent misuse of such information by employees and associates.

A lawyer should exercise care to prevent disclosure of confidences and secrets of one client to another and should accept no employment that might require such disclosure.

Former Client

The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve disclosure of confidences and secrets.

A lawyer should also provide for the protection of the client's confidences and secrets following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the client's personal papers to be returned to the client and for the lawyer's papers to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the client's instructions and wishes should be a dominant consideration.

Rule 7.2. Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this Rule shall include the name of at least one licensed Minnesota lawyer responsible for its content if the legal services advertised are to be performed in whole or in part in Minnesota.

(e) Every lawyer associated with or employed by a law firm which causes or makes a communication in violation of this Rule may be subject to discipline for failure to make reasonable remedial efforts to bring the communication into compliance with this rule.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) fail to file federal or state individual income tax returns, corporate income tax returns, partnership income tax returns, or employer's withholding tax returns within the time required by law.

FILE NO. CI-84-2140

JUL 25 1989

STATE OF MINNESOTA

IN SUPREME COURT

FILED

In Re Petition to Amend the
Minnesota Rules of Professional
Conduct.

STATEMENT IN SUPPORT OF
AMENDMENTS TO THE MINNESOTA
RULES OF PROFESSIONAL CONDUCT
PROPOSED BY THE LAWYERS
PROFESSIONAL RESPONSIBILITY
BOARD

INTRODUCTION

In 1987, a Lawyers Board Rules Committee (Rules Committee) was appointed by the Lawyers Professional Responsibility Board to study and consider proposed changes to the Minnesota Rules of Professional Conduct and the Rules on Lawyers Professional Responsibility. The Rules Committee studied a number of proposals for rule amendments and made recommendations to the Lawyers Board for amendments to the Minnesota Rules of Professional Conduct. The Lawyers Board at its April 15, 1988, and September 9, 1988, meetings approved the amendments which are contained in the petition filed herewith. This statement is submitted in support of the proposed rule amendments.

AMENDMENT TO RULE 1.6

Lawyers must hold client confidences and secrets inviolate in order to obtain the full development of facts essential to representation and to encourage clients to seek early legal assistance. As a general rule, the duty to preserve client confidences and secrets is paramount. In certain circumstances, however, this duty is subordinated to other interests. For example, Rule 1.6(b)(3) permits a lawyer to reveal a client's intention to commit a crime. Rule 3.3(a)(4) allows the lawyer to

take reasonable remedial measures, including the disclosure of client confidences and secrets, where false material evidence has been offered to the court. See also Rule 3.3(b). Moreover, the United States Supreme Court has recently announced that criminal clients have no right to an attorney's assistance in testifying falsely. Nix v. Whiteside, 475 U.S. 157 (1986). The majority in Nix found defense counsel's conduct in threatening his client with disclosure of the client's anticipated perjurious testimony to be exemplary.

Confidentiality requirements should not permit a client, who utilized a lawyer's services in committing a crime or fraud, to invoke an ethical rule to prevent the lawyer from taking action to rectify or minimize the consequences of a crime or fraud. Although Rule 1.6(b) permits lawyers to reveal the intention of a client to commit a crime, it does not permit disclosure when the lawyer finds out, after the fact, that the lawyer's services were used by the client to commit a fraudulent or criminal act. The Board believes that lawyers should have discretion to reveal information necessary to rectify the consequences of a client's crime or fraud because:

1. No public interest is served by protecting this kind of communication. In fact, the integrity of the profession and the public's perception of the profession most likely suffers when a client uses the lawyer to commit a crime or fraud and the lawyer is prohibited by an ethical rule from taking any action to rectify or minimize the consequences.

2. Attorneys should be permitted to disclose information necessary to rectify the consequences of the crime or fraud in order to avoid being subject to criminal, civil and disciplinary charges, as well as the attendant damage to their reputation.

The proposed amendment would permit disclosure only where the client has utilized the lawyer's services in committing the criminal or fraudulent act. Client communications concerning a criminal or fraudulent act which was committed prior to the client's hiring of the lawyer would still remain protected.

The proposed Rule 1.6 amendment is identical to an amendment which was approved by the Wisconsin Supreme Court in 1987 and has been in effect since January 1, 1988.

The proposed amendment is also in harmony with the "crime-fraud exception" to the attorney-client privilege. This exception has long been recognized at common law, and has most recently been considered by the United States Supreme Court in U.S. v. Zolin, et. al, 49 CCH S.Ct.Bull.p.B3501 (U.S. June 21, 1989) (No. 88-40). The Court noted the policy concern the Board now recommends to this Court:

It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy,' ibid., between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime. O'Rourke v. Darbishire, [1920] A. C. 581, 604.

Id. at B3510.

AMENDMENT TO RULES 7.2(d) AND (e)

The purpose of Rule 7.2(d) is to insure lawyer accountability for lawyer advertising which violates the false, fraudulent or misleading standard of Rule 7.1. In recent years, there has been an increasing number of law firms utilizing trade names. In addition, the number of multistate law firms has also increased. The proposed amendment to Rule 7.2(d) is necessary to ensure lawyer accountability for communications advertising legal services to be performed by Minnesota attorneys.

The proposed amendment in Rule 7.2(e) is necessary because in a multistate law firm, advertising communications are often initiated by attorneys who are not licensed in Minnesota. The proposed amendment recognizes that imposing vicarious disciplinary responsibility upon every lawyer associated with a law firm which causes a misleading or fraudulent ad would be unfair. Therefore, the proposed rule provides disciplinary responsibility only if the Minnesota lawyers fail to make reasonable remedial efforts to bring the communication into compliance with the Minnesota advertising rules.

AMENDMENT TO RULE 8.4(g)

Since 1972, failure to file income tax returns has resulted in discipline for Minnesota attorneys. In re Bunker, 294 Minn. 47, 199 N.W.2d 628 (1972). At no time, however, has there been a specific rule in the Rules of Professional Conduct or the prior Code of Professional Responsibility which expressly states that failure to file income tax returns constitutes professional misconduct for which lawyers may be disciplined. The Comment to Minnesota Rule 8.4 identifies failure to file tax returns as a kind of "illegal conduct" which reflects adversely on a lawyer's fitness to practice law. The reality is, however, that the majority of lawyers disciplined for failure to file tax returns are never criminally prosecuted or even charged.

One of the goals of the Rules of Professional Conduct was to provide lawyers with specific notice of the conduct proscribed. Due to the number of disciplinary cases involving lawyers who fail to file income tax returns, the Board believes that the proposed rule amendment would further this purpose.

The amendment is not intended to expand the application of Minnesota case law in this area. Instead, the amendment would codify the basic principle of existing law.

MINNESOTA STATE BAR
AMENDMENT PROPOSALS

The Lawyers Professional Responsibility Board understands that the Minnesota State Bar Association will be filing proposals for amendment to the Rules of Professional Conduct concurrently with the Board's petition. The Board will consider the Bar Association's proposals at its September 15 meeting, and will file comments with the Court shortly thereafter.

Dated: July 21, 1989.

Respectfully submitted,

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD



GREGORY M. BISTRAM
VICE-CHAIRMAN



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